UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MANAGEMENT & TRAINING CORP
d/b/a KEYSTONE JOB CORP CENTER

and Case 04–CA–118130

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 668

Margaret M. McGovern, Esq.,
for the General Counsel.
Martha J. Amundsen, Esq.,
for the Respondent.
Kimberly L. Yost,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 14 and June 4, 2014. The Union filed the charge on December 2, 2013, and the General Counsel issued the complaint on January 29, 2014.

The complaint alleges that the Respondent violated Section 8(a) (5) and (1) of the Act when it unilaterally changed the way overtime pay was calculated. The Respondent filed an answer denying the essential allegations and raising several defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,[1] I make the following

[1] The General Counsel filed a Motion to Correct Transcript, noting several errors in transcription. The Respondent did not respond. I grant the Motion, as the errors and requested corrections are consistent with my notes and recollection.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Management and Training Corporation, operates the Keystone Job Corps Center, a residential training center for disadvantaged youth in Drums, Pennsylvania. The Respondent annually purchases and receives goods at the facility valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, SEIU Local 668, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Union represents the three bargaining units at the Respondent's facility located in Drums: residential advisers, professionals (teachers, counselors, nurses), and maintenance workers (maintenance, food service, transportation). The collective-bargaining agreement for the maintenance unit expired June 30, 2012. (GC Exh. 4.) The collective-bargaining agreements for the residential advisors and professionals both expired June 30, 2013. (GC Exhs. 2 and 3.) No new collective-bargaining agreements have been reached.

Contract Provisions Regarding Overtime Pay

All three collective-bargaining agreements state that employees shall be paid time and one-half "for hours worked in excess of 40 in a regular work week." (GC Exh. 2, p. 14; GC Exh. 3, p. 15; GC Exh. 4, p. 9.) The phrase "hours worked" is not defined in any of the three collective-bargaining agreements.

None of the three collective-bargaining agreements indicate whether holidays or vacation days are to be considered as hours worked. The collective-bargaining agreements for the residential advisors and the professional units do expressly exclude sick pay: "sick leave … is not considered "time worked" toward the computation of overtime." (GC Exh. 2, p. 28; GC Exh. 3, p. 32.) The maintenance contract is silent as to the effect of sick leave, but it is undisputed that sick leave was never considered as hours worked when calculating overtime pay for any of the units.

Respondent's Company Policy Regarding Overtime Pay

The Respondent's internal policy 204.5, that was in effect at the relevant time, states:

> B. 4. a. For Job Corps centers and the corporate office, holidays and approved vacation time actually taken during the workweek will be considered as time worked in the computation of overtime.
> ….

c. All other leave time, including sick leave, will not be considered as time worked in the computation of overtime.

(GC Exh. 10.)

Calculation of Overtime Pay

Residential Advisor Doug Hayes has been employed by the Respondent since 1991. He testified that throughout those years and until recently, vacation and holiday hours were counted as hours worked for purposes of the 40-hour threshold for overtime. (Tr. 38.)

Residential Advisor Renay Arnold has been employed by the Respondent for almost 25 years, and she is the chief steward in her unit. (Tr. 90, 125.) She testified that, until August 2013, the Respondent had counted vacation days and holidays as hours worked when calculating overtime. (Tr. 90.)

Maintenance Specialist Erik Peters has been employed by the Respondent for 8 years, and he is the chief steward in his unit. He testified that throughout the period of his employment and until the fall of 2013, the Respondent had counted holiday and vacation days as hours worked when determining the 40-hour overtime threshold. (Tr. 48.)

Ursula Uhrin, currently a member of the professional bargaining unit and previously the residential advisor unit, has been employed by the Respondent for over 25 years. She testified that, until recently, vacation and holiday hours were counted toward the 40-hour threshold for overtime. (Tr. 86.)

Change in Calculation of Overtime Pay

In July 2013, residential advisor Joseph Veach did not receive overtime pay as he had in the past. He inquired about it and was advised by Finance Manager Jonathan Grimes that although vacation time is counted as time worked, it is paid at the straight pay rate, not the overtime rate, even after 40 hours. (GC Exh. 15; R Exh. 4.) Renay Arnold filed a grievance on behalf of Veach as well as Emil Haraschak, on the same grounds.[2] (Tr. 91.)

Hayes testified that he became aware that a change occurred in August 2013, when other employees were discussing it. He was personally affected in early September 2013, when he took a vacation day during Labor Day week. Although he requested 1.5 hours of overtime, his time card was changed to reflect that neither the holiday nor his vacation day was counted toward the calculation of overtime pay. (Tr. 39, 40.) As a consequence, Hayes contacted the Union and filed a grievance. (GC Exh. 11.) The grievance was denied at Steps 1, 2, and 3. (GC Exhs. 7, 9, and 11.) Hayes testified that the changed policy has continued in effect, so that he has lost overtime pay on at least one other occasion. (Tr. 43.)

Peters testified that he became aware of a change in the calculation of overtime pay in the fall of 2013. His manager, Jim Pauloconis, announced to the maintenance staff that the policy

[2] The testimony regarding the results of the grievance was stricken from the record by agreement of the parties. (Tr. 99.)

changed, such that vacation hours and holidays were no longer considered hours worked for purposes of calculating the 40–hour overtime threshold. (Tr. 49–50.) Pauloconis showed Peters a fact sheet that advised managers and supervisors to discuss the change with their bargaining unit employees. It stated that, effective immediately (pay date October 25), "[H]oliday and vacation time will no longer count towards the computation of overtime." (GC Exh. 13.)

In October 2013, emails were sent by Financial Manager Jonathan Grimes to the employees in each bargaining unit. (Tr. 43, 87–88, 173.) Enclosed were undated memoranda purporting to clarify the manner in which overtime pay was calculated for each of the units: the residential advisor, maintenance, and professional units. Each memorandum included the following language: "The Company will pay overtime for hours "worked" over 40 hours in a workweek. Vacation time and holiday time are not considered hours "worked"." (GC Exhs. 12, 14, and 20.)

Communications Between the Union and Respondent Regarding Overtime Pay

Union Business Agent Kimberly Yost has represented members in all three bargaining units for over 20 years. Her duties include negotiating the contracts, administering them, and filing grievances on behalf of members. (Tr. 21, 31.) She testified that she was contacted by several shop stewards in 2013, who advised her that the Respondent had changed its method of calculating overtime pay. (Tr. 23, 24.)

On October 21, 2013, Yost wrote to Respondent's counsel, Martha Amundsen, to notify her that she was aware of the policy change. She requested that the Respondent cease unilateral implementation of the change and asked that Amundsen contact her to bargain over the matter. (GC Exh. 6.)

In response, on November 7, 2013, Amundsen advised Yost that overtime was being calculated in compliance with the expired collective-bargaining agreements. (GC Exh. 8.) She further stated that:

> [i]f there has been any other interpretation of these CBAs in the past, that interpretation is incorrect and not required by federal law or state law, and is in violation of the CBA. At this time, MTC will not seek reimbursement from the employees for any mistake resulting in any past overpayment to the employees based on any incorrect interpretation of this issue.
>
> Even if a bargaining unit member or the union is seeking to prove a different past practice than the express language of the CBA, legally past practice cannot trump the express language of the CBA. "Plain and unambiguous words are undisputed facts…Prior acts cannot be used to change the explicit terms of a contract…The intent of the Parties is to be found in the words which they, themselves, employed to express their intent." Additionally, prior CBAs (which are now terminated and invalid) may have contained different language or policies which are inapplicable.

(GC Exh. 8.)

No bargaining occurred and the Respondent has continued to apply the revised method of calculating overtime pay.

III. Legal Standards and Analysis

It is well-established that an employer violates Section 8(a) (5) and (1) of the Act if it changes the wages, hours, or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962).

Even when negotiations for a new collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.").

The Respondent does not concede that any change occurred in the way overtime pay was calculated in 2013. It simply suggests that the method was "clarified," or that mistakes or misunderstandings were corrected. However, no evidence was presented to support any of those hypotheses. Implicit in the Respondent's actions in the fall of 2013 is an admission that the method of calculating overtime was changed. For example, Amundsen's November 7 letter references past interpretations and past practices. (GC Exh. 8.) The fact sheet that Pauloconis gave Peters is clear evidence of a change in the method of calculating overtime pay. (GC Exh. 13.)

I find that the Respondent did make a unilateral change as alleged. Specifically, I find that the Respondent had previously counted holidays and vacation days as hours worked when calculating the 40–hour threshold for overtime pay. I further find that it ceased counting holidays and vacation days as hours worked in the summer of 2013, and officially notified its own management, as well as the employees, of the change in October 2013. This change was made without notifying the Union of any proposed change, thus the Union had no opportunity to bargain over the change.

These findings are based on the uncontradicted testimony of the witnesses presented by the General Counsel, from each of the three bargaining units. Their testimony is supported by the pay records as well as the Respondent's own documents, most significantly the fact sheet and the "clarifying" memoranda (GC Exhs. 12, 13, 14, and 20.) The Respondent presented no testimony or documentary evidence that rebuts that offered by the General Counsel.

The three collective-bargaining agreements are silent as to whether holidays and vacation days are considered hours worked for purposes of calculating overtime. The General Counsel asserts that the Respondent's prior method of calculating overtime pay constituted a past practice. The party asserting the existence of a past practice bears the burden of proof on the issue. The evidence must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc*., 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

I find that the General Counsel has met his burden on this point. The witnesses testified that, throughout their employment and until the August/September/October 2013 time period, the Respondent had counted holidays and vacation days as hours worked for purposes of meeting the 40-hour workweek threshold for computing overtime pay. The pay records that were introduced by the General Counsel support his position. There was no evidence that this method of calculating overtime pay was an error, or occasional, or inconsistent, rather than routine, as attested to by the witnesses and supported by the pay records and documents, including the fact sheet. (GC Exh. 13.)

The Respondent argues that it is applying a reasonable interpretation of the collective-bargaining agreements and abiding by the express language of the contracts, since none of the contracts require it to count vacation days and holidays as hours worked. While that may be true, it is irrelevant in this case. There is no issue of contract interpretation here; the issue is whether the Respondent implemented a unilateral change.

The Respondent asserts that if errors were made in the past in overtime pay calculations, and it desired to correct the practice, then the contract language is controlling, rather than the past practice. However, that is not the situation here, as there is no evidence that counting holidays and vacation days toward the 40-hour threshold for overtime pay was a mistaken interpretation of the contracts by anyone in management. Rather, the evidence shows that the interpretation was consistent with the Respondent's own policy and was consistently applied in the past. Nor is it relevant, as the Respondent argues, that the Respondent's current interpretation is permitted by federal and state law.

The Respondent argues that it met its obligation to bargain with the Union regarding overtime pay when the collective-bargaining agreements were negotiated. However, that does not address the obligation to provide notice and an opportunity to bargain prior to making the unilateral change at issue.

Finally, the Respondent relies on the Management Rights clauses in the expired collective-bargaining agreements for authority for its action. Those clauses reserve rights to management that are not expressly stated in the contracts. Since the contracts do not expressly state that vacations days and holidays are to be counted as hours worked, the Respondent contends it is free to decide not to count that time as hours worked. First, those clauses do not overcome the fact that the Respondent implemented a unilateral change. In any event, management rights clauses do not survive the expiration of the contract. *Quebecor World Mt. Morris 11, LLC* 353, NLRB No. 1. Slip op. p. 2 (2008), citing *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). Therefore, it is unnecessary to belabor the fact that the Respondent did not meet its burden to show that the Union clearly and unmistakably relinquished its statutory right to bargain. *United Cable Television Corp*., 296 NLRB 163, 167 (1989); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993); see also *Regal Cinemas, Inc. v. NLRB,* 317 F.3d 300, 314 (D.C. Cir. 2003); *Ohio Power Co*., 317 NLRB 135, 136 (1995), citing *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983); *American Benefit Corp.,* 354 NLRB 129 (2010); *Provena St. Joseph Medical Center,* 350 NLRB 808, 810–812 (2007); *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992), enfd. without op. 25 F.3d 1044 (5th Cir. 1994); *Kingsbury, Inc.*, 355 NLRB 1195, 1206 (2010); *Johnson-Bateman Co.,* 295 NLRB 180, 184–185 (1989); *Outboard Marine Corp.,* 307 NLRB

1333, 1338 (1992); *Burns International Security Services,* 324 NLRB 485 (1997), enf. denied on other grounds, 146 F.3d 873, 487 (D.C. Cir. 1998).

For the foregoing reasons, I conclude that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By making changes to the method of calculating overtime pay without providing the Union prior notice and an opportunity to bargain over proposed changes, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be required to rescind the unilateral change in the way overtime pay was calculated and resume counting holidays and vacation days as hours worked for purposes of calculating overtime pay. It shall further be required to make employees at the Drums facility whole for losses incurred during the period of time the Respondent did not count holidays and vacation days as hours worked when calculating overtime pay.

Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards covering more than 1 calendar year. *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Management & Training Corporation, located in Drums, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Making any changes to the method of calculating overtime pay without providing the Union prior notice and an opportunity to bargain over proposed changes;

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Restore the status quo ante, by rescinding the unilateral change in the manner of calculating overtime pay, and resume counting vacation days and holidays as hours worked for purposes of calculating overtime pay.

   (b) Before making any changes to the method of calculating overtime pay, notify and, on request, bargain with the Union as the exclusive representative of the employees in the three bargaining units: maintenance, residential advisor, and professional.

   (c) Make employees at the Drums facility whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral action in changing the method used to calculate overtime pay, as set forth in the remedy section of this decision.

   (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

   (e) Within 14 days after service by the Region, post at its facility in Drums, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of

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4 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 22, 2014

_____
Susan A. Flynn
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT make any changes to the method of calculating overtime pay without providing the Service Employees International Union, Local 668, prior notice and an opportunity to bargain over proposed changes, as the sole and exclusive bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral change to the method of calculating overtime pay and resume counting holidays and vacation days as hours worked for purposes of calculating overtime pay.

WE WILL make employees whole for any loss of earnings and other benefits resulting from the unilateral change in the method of calculating overtime pay, with interest.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

MANAGEMENT & TRAINING CORPORATION

(Employer)

Dated_____By_____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, Suite 710, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-118130 or by using the QR code below. Alternatively, you can obtain a copy o f the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.